

In the Matter of)
)
AT&T Corp. Petition for Declaratory) WC Docket No. 03-133
Ruling Regarding Enhanced Prepaid Calling)
Card Services)

WilTel Communications, LLC (“WilTel”) hereby opposes AT&T’s Motion for Stay Pending Appeal¹ (“Motion”) and urges the Commission to reject AT&T’s attempt to further delay its compliance with federal Universal Service Fund (“USF”) contribution requirements. Because the Motion fails the test for granting a Stay, the Commission must deny the request.

After almost two years during which AT&T withheld required USF contributions on prepaid calling card revenues and forced its competitors to subsidize its USF obligations while the company prosecuted its regulatory gamble, the Commission correctly found that AT&T was breaking the law.² Now, AT&T seeks to play out the

¹ Motion for Stay Pending Appeal, Subject to Posting of Security, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133 (filed March 28, 2005), *Errata* (filed March 29, 2005) (“*AT&T Motion*”). Although AT&T filed its initial motion on March 28, 2005, it filed a letter on March 29, 2005, asking the Commission to replace the initial filing with the amended version attached to its March 29 letter. Accordingly, WiTel believes that the correct filing date for purposes of Oppositions to the Motion is March 29. Based on section 1.45(d) of the Commission’s rules, therefore, this Opposition is timely filed. *See* 47 C.F.R. § 1.45(d). To the extent, that the Commission nevertheless holds that the correct filing date is March 28 or that WiTel’s Opposition is not timely filed, then WiTel respectfully requests that this Opposition also be treated as a request to allow WiTel to file a late-filed Opposition.

² *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services, Order and Notice of Proposed Rulemaking*, WC Docket Nos. 03-133 and 05-68 (rel. Feb. 23, 2005) (“*Declaratory Ruling*”).

remainder of its regulatory game by asking the Commission to delay the Declaratory Ruling's effectiveness and require competitors to continue subsidizing AT&T's obligations. The Commission should reject this tactic and find that the public interest, law and equities compel that AT&T's Motion be denied.

II. THE MOTION FAILS THE TEST FOR GRANTING A STAY

A party seeking stay of an FCC order must demonstrate that: (1) it has a substantial likelihood of succeeding on the merits; (2) it would suffer irreparable harm absent relief; (3) a grant of the stay would not substantially harm others; and (4) the requested relief would be in the public interest.³ AT&T's Motion fails to satisfy any of these criteria.

A. AT&T is Not Likely to Succeed on the Merits

In its Declaratory Ruling, the FCC carefully and thoroughly addressed and rejected each of AT&T's arguments supporting its position. After reviewing more than 500 comments filed in this proceeding, the Commission correctly found that AT&T's "enhanced" prepaid calling card service is a Telecommunications Service and, as such, is subject to USF contribution requirements.⁴ The FCC is to be congratulated for its thoughtful decision, not challenged. In its Motion, AT&T merely rehashes the same, discredited contentions rejected by the Commission. There is simply no basis for believing that a court will find that the FCC erred in this case.

In a last ditch attempt to sway the Commission, AT&T complains that other prepaid calling card providers who claimed they were contributing to the USF in fact are not, and that affirming the FCC's decision therefore will put AT&T at a competitive

³ *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

⁴ *Declaratory Ruling*, at ¶¶ 14, 21, 31.

disadvantage. However, AT&T only provided evidence that one company may not be contributing to the USF – a company that was not among those who said on the record that they were contributing. More importantly, other companies' failure to contribute as required only reinforces the need for and outcome of the Declaratory Ruling. The Declaratory Ruling applies to and is enforceable against other carriers as well as AT&T. To the extent that their activities are the same as AT&T's or otherwise fall within the legal analysis employed by the Commission to address AT&T's activities, these entities are subject to USF enforcement just like AT&T.⁵ Accordingly, AT&T is incorrect that failure of other carriers to contribute to the USF is a basis for a court to overturn the FCC's decision.

B. AT&T's Competitors will Suffer Irreversible Harm if the Stay is Granted

WilTel and other competitors will suffer irreversible harm if the Commission grants the Stay. Partly because AT&T and other carriers have failed to meet their USF contribution requirements, the universal service fund is facing a severe shortfall. This funding shortfall has forced the Commission to set an unprecedented 11.1% contribution factor for the second quarter of 2005, up from 8.9% in the fourth quarter of 2004. WilTel and its customers must contribute based on this factor even while AT&T continues to withhold the amounts that it withheld illegally and USF contribution on prepaid calling card service revenues going forward. Competing carriers are hurt because they and their customers must contribute an absurdly high amount to the USF but also because AT&T and similar providers will continue to maintain an artificial competitive advantage by withholding contributions for the same services on which other carriers are contributing. Such a competitive advantage cannot be undone, even if AT&T ultimately has to pay the

⁵ *Declaratory Ruling*, at ¶¶ 31-32 and note 67.

withheld amounts and its competitors ultimately receive USF credits, as AT&T can continue to gain customers at its competitors' expense. AT&T's offer to post security does not mitigate this damage. At best, it will further delay AT&T's payment, and therefore do nothing to bring down the contribution rate or resolve the competitive inequality that exists today.⁶

C. The Public Interest Would Not Be Served by Granting the Stay

Finally, the public interest would not be served by granting the Motion. If it grants the Motion, the Commission would signal to AT&T and other entities that AT&T's regulatory game plan works and that they can ignore regulations and avoid the consequences so long as they can delay a final Commission decision. AT&T's pattern is clear. With both its "IP-in-the-Middle"⁷ and its prepaid calling card services, AT&T has offered a service that legally and logically falls within the definition of "Telecommunications Service" but has withheld access charges and/or USF contributions after seeking an FCC determination that the services are "enhanced". With this "regulatory cover" in place, AT&T obtains a competitive advantage so long as the FCC fails to act on its petition. AT&T lengthens the decision process by making irrelevant arguments, threats and political maneuvers. When it loses, AT&T appeals or otherwise engages in lengthy court proceedings.⁸ Although it may someday have to meet its regulatory requirements like the rest of the industry, AT&T meanwhile obtains customers and market share, not through superior products or customer services, but, rather, through

⁶ Moreover, AT&T's pledge to post security does not appear to address all of AT&T's obligations. For example, it is not clear whether the pledge would cover both the amounts that AT&T already owes (plus interest) and those that come due while the appeal is pending.

⁷ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order (rel. April 21, 2004).

⁸ See, e.g., *Southwestern Bell Telephone L.P. et al. v. AT&T Corp. et al.*, 4:04-cv-00474-HEA (E.D. Missouri). Trial in this case is scheduled for August 2006.

regulatory risk-taking. To the extent that this tactic proves to be a winner, other companies will follow. The resulting noncompliance will multiply the irreparable injury resulting from grant of the Motion.

III. CONCLUSION

The Commission must deny AT&T's Motion for Stay because it fails to meet the requirements for granting a Stay. If granted, the Stay would allow AT&T to continue to subvert the USF and maintain an artificial competitive advantage, which would result in irreparable harm to its competitors. Moreover, granting the Stay would not serve the public interest because it would send precisely the wrong message about carriers' ability to violate the Commission's rules with impunity.

Respectfully submitted,



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April 5, 2005

CERTIFICATE OF SERVICE

I, Adam Kupetsky, do hereby certify that a copy of the foregoing Opposition of WilTel Communications, LLC to Motion for Stay Pending Appeal, Subject to Posting of Security was sent this 5th day of April, 2005, to the parties listed below.

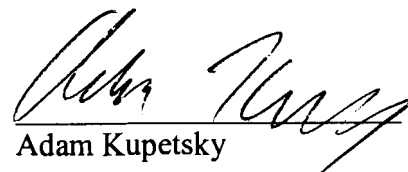
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